IP 05-0153-CR 1 M/F USA v Harcharik
Judge Larry J. McKinney Signed on 4/20/06

INTENDED FOR PUBLICATION AND PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
HARCHARIK, TIMOTHY,	)	CAUSE NO. IP05-0153-CR-01-T/F
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY HARCHARIK, Defendant.	)))))))	IP 05-153-CR-01 M/F

ORDER

I. INTRODUCTION

Defendant Timothy Harcharik ("Harcharik") has been charged in a one-count indictment for obstruction of a Securities and Exchange Commission ("SEC") Investigation for false and misleading testimony given on three occasions in New York, New York, in violation of 18 U.S.C. § 1505. He moves to dismiss the indictment for improper venue.

The Court denied Defendant's Motion to Dismiss Indictment on February 23, 2006, the same day that Defendant filed his reply. Since that time, the Government has been granted leave to file a second response and Defendant has filed a surreply. Defendant's Motion to Reconsider Defendant's Motion to Dismiss for Proper Venue is **GRANTED**, the Court's February 23, 2006, Order, is **VACATED**, and the Court will revisit the issue as discussed herein.

Ultimately, and for the reasons given below, the Defendant's Motion to Dismiss Indictment is **GRANTED.**

II. BACKGROUND

Brightpoint, Inc. ("Brightpoint"), is a Delaware corporation with its principle place of

business in Plainfield, Indiana. Indictment at 1. American International Group, Inc. ("AIG"), is a Delaware corporation with its principle place of business in New York, New York. *Id*. at 2. Harcharik was an independent contractor who administered Brightpoint's insurance needs as its full time director of risk management. *Id*. at 3.

The Complaint alleges the following, in pertinent part: In early 1998, Brightpoint recognized that it was going to incur substantial losses due to problems in its operations in the United Kingdom. *Id*. at 11. In and around December 1998 and January 1999, Harcharik was involved in negotiating an agreement between Brightpoint and AIG. *Id*. at 13, A-C. That agreement was subsequently used to intentionally falsify Brightpoint's books and records, and subsequently mislead Brightpoint's independent public auditors, in violation of federal securities laws. *Id*. at 14.

On or about January 24, 2002, March 21, 2002, and May 2, 2002, Harcharik unlawfully, willfully, and knowingly, corruptly influenced, obstructed and impeded, and endeavored to influence, obstruct and impede the due and proper administration of the law under which a pending proceeding was being had before a department and agency of the United States, namely, the SEC, by providing and causing to be provided false and misleading information to the SEC regarding his knowledge of the agreement between Brightpoint and AIG and the matters surrounding it in order to conceal his knowledge of, and role in, the falsification of Brightpoint's books, records, accounts, the misrepresentations made to Brightpoint's independent public auditors, and otherwise obstruct, impede, and influence the due and proper administration of justice. *Id*. at 15.[1]

III. DISCUSSION

[1] On those dates, Harcharik appeared before the SEC in New York, New York, pursuant to subpoena, and gave the testimony in question under oath. *Id*. at 17, A-D.

Proper venue in criminal proceedings is mandated by the Constitution, Article III § 2, cl 3, which provides in pertinent part that "[t]he Trials of all Crimes . . . shall be held in the state where the said Crimes shall have been committed." Additionally, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." This mandate is codified in Federal Rule of Criminal Procedure 18, which provides in pertinent part, that "the prosecution shall be had in a district in which the offense was committed."

Some criminal statutes specify where a crime should be deemed to have occurred, but if the statute does not specify, the general venue statute, 18 U.S.C. § 3237(a), applies.[2] *See United States v. Ringer*, 300 F.3d 788, 791 (7th Cir. 2002). When Congress has not specifically defined where a crime should be deemed to have occurred, the "'*locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *United States v. Cabrales*, 524 U.S. at 1, 7 (quoting *United State v. Anderson*, 328 U.S. 699, 703 (1946)). "To determine venue, we examine the key verbs in the statute defining the criminal offense to find the scope of the relevant conduct." *United States v. Tingle*, 183 F.3d 719, 726 (7th Cir, 1999) (internal quotation omitted). If the crime consists of distinct parts occurring in different places, or involves "a continuously moving act," venue is proper where any part of the crime occurred. *Travis v. United States*, 364 U.S. 631, 636 (1961).

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[2] Section 3237(a) provides that

> any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Harcharik is charged under the "omnibus" provision of Section 1505, which states that it is a crime to "willfully and knowingly endeavor to corruptly influence, obstruct and impede the due and proper administration of the law" in a SEC proceeding. Section 1505 does not contain a venue provision. The elements of a violation of the omnibus provision of Section 1505, as modified by the Indictment, are:

> 1. The defendant influenced, obstructed, impeded or endeavored to influence, obstruct or impede the due administration of the law;
>
> 2. By giving materially false and misleading information to the SEC;
>
> 3. The defendant did so knowingly; and
>
> 4. The defendant's acts were done corruptly, with the purpose of wrongfully impeding the due and proper administration of the law.

Seventh Circuit Federal Jury Instructions 1999 (West, p. 272) (modified)).

The Court must determine whether the Government proved by a preponderance of the evidence that the crimes occurred in the district charged, viewing the evidence in the light most favorable to the government. *See United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir. 2000); *Tingle*, 183 F.3d at 726 (internal citation omitted). Harcharik contends that this action is not properly in the Southern District of Indiana because the charged offense as alleged in this case began, continued, and was completed in one federal judicial district, and it was not the Southern District of Indiana.

As Harcharik points out, Congress enacted 18 U.S.C. § 1512(h) to expand the venue for cases under 18 U.S.C. §§ 1503 (influencing or injuring a juror) and 1512 (witness tampering). The venue provision was enacted specifically to address a circuit split concerning whether venue lies only in the district where the defendant took actions to obstruct justice, but also in the district where the proceeding sought to be obstructed is pending. *See* 134 Cong. Rec. 17360-02 (1988); H.R. Rep. 100-169 at 11-12 (1987). Specifically, Section 1512 was amended to provide that "[a] prosecution

under this section [1512] or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which conduct constituting the alleged offense occurred." 18 U.S.C. § 1512(h). The amendment to Section 1512 clarified the geographical scope for those jurisdictions where prosecutions for obstruction were limited to the district where the obstructive conduct occurred. It provided no such clarification for Section 1505. Accordingly, the Government's citation to cases such as *United States v. Frederick*, 835 F.2d 1211 (7th Cir. 1987) (involving an allegation of witness tampering in violation of Section 1512), provides no relevant guidance to the Court and do not control the venue issue here, either directly or by analogy.[3]

The Court follows the only federal decision addressing the issue of venue in a case under Section 1505. In *United States v. Trie*, 21 F. Supp. 2d 7 (D.D.C. 1998), a district court found jurisdiction proper in the District containing the "official proceeding" sought to be affected for counts of witness tampering in violation of Section 1512, but not a Section 1505 violation. The court noted that obstruction of justice is not a continuing offense and that venue exists only in the district in which the offense took place, and "[w]hile the Congress enacted the special venue provision expressly to overrule . . . cases with regard to Sections 1503 and 1512, it did not do so for Section 1505." *Id*. at 18 (internal citations omitted). The Government fails to address the analysis or the holding of *Trie* in its briefing. The Court concludes, from the omission of a reference in § 1512(h) to §1505, that Congress intended to restrict venue for Section 1505 offenses to the district where the act of obstruction took place. *See id*. at 18 n. 10.

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[3] The Court also rejects the Government's attempt to analogize *Ringer*, 300 F.3d 788, a case involving a prosecution for false material statement in a matter within the jurisdiction of the federal sovereign under 18 U.S.C. § 1001, as it does not fall within the purview of the criminal statute at issue in this case.

Furthermore, even if Congress intended similar venue treatment for Section 1505 violations as provided for in Sections 1503 and 1512, venue in this case still would not lie in the Southern District of Indiana. The "official proceeding" pursuant to which Harcharik was subpoenaed and allegedly made false obstructive statements was a SEC administrative investigation conducted by the Accounting and Enforcement Section of the SEC's Northeast Regional Office in New York. The geographical coverage of the Northeast Regional Office does not even include Indiana. *See* Def.'s Surreply at 3 n. 1. The Government's argument ignores the fact that the proceeding Harcharik allegedly sought to obstruct was not, and is not, pending in this District. The fact that "substantial evidence necessary to show that the statements were false is in this district," *see* Gov.'s Second Resp. at 4, does not carry the day.

IV. CONCLUSION

For the reasons discussed above, defendant's, Timothy Harcharik, Motion to Dismiss Indictment is **GRANTED**.

IT IS SO ORDERED this 20th day of April, 2006.

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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